Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

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Radha R.M. Narumanchi .. Petitioner

Vs.

Board of Trustees for
Connecticut State
Universities, Michael
Adanti; Alan Leader .. Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

-0-0-

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QUESTION PRESENTED

Can the (infected) **findings of fact** (by a wrong trier of facts) **determined on issues in equity during a bench trial** (trial court, i.e. the Hartford Federal District Court, having wrongfully dismissed Plaintiff's all legal claims initially and thus deprived him of his Seventh Amendment right for jury trial - the remaining issues in equity do not confer such a right on the Plaintiff), **be used, in violation of Plaintiff's revived and/or restored Seventh Amendment right for a jury trial** (after the Court of Appeals for the Second Circuit had, on appeal, reversed the initial wrongful dismissal of Plaintiff's legal claims and remanded the legal issues to the District Court), **to subsequently grant** (in the same remanded case) **defendants' motion for Summary Judgment on legal issues ?**

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No. _____

IN THE SUPREME COURT
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UNITED STATES OF AMERICA

OCTOBER TERM, 1991

Radha R.M. Narumanchi .. Petitioner

Vs.

Board of Trustees for Connecticut
State Universities; Michael Adanti;
Alan Leader .. Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Pro Se Petitioner, Radha R.M. Narumanchi, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the

United States Court of Appeals for the Second Circuit, which failed to grant Petitioner's request for relief from lower court's Summary Judgment (on the remanded legal claims of the petitioner), which had, in violation of Petitioner's Seventh Amendment right for a jury trial (in the same case), essentially incorporated the "infected" findings of fact determined by it ("the wrong trier of facts") earlier, on issues in equity (Title VII claims) during a bench trial, after having wrongfully dismissed petitioner's all legal claims initially (and thus deprived him, at the very outset, of his Seventh Amendment right for jury trial - the remaining issues in equity not conferring such a right for jury trial on the petitioner).

OPINIONS BELOW

The Slip Opinion of the Court of Appeals for the Second Circuit (which prohibited (a) the publication of its summary order; or (b)

its citation; or (c) its reliance, in unrelated cases before the Second Circuit or any other court) issued April 22, 1991 appears in Appendix A to this Petition. The denial of Petition for Rehearing, issued June 10, 1991, and the Mandate issued June 25, 1991 by the Court of Appeals appear in Appendix D and E respectively to this Petition. The Summary Judgment and Rulings of the District Court for Connecticut District appear in Appendix B and C to this Petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on April 22, 1991. A timely Petition for Rehearing was filed on May 2, 1991. The Court of Appeals' denial of the Petition for Rehearing was issued on June 10, 1991 and the Court of Appeals' Mandate issued June 25, 1991 are both set forth in Appendix D and E respectively. This Court's jurisdiction is invoked under Title 28, U.S.C. Sec.1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VII to the United States Constitution and Rule 38(a) of Federal Rules of Civil Procedure are set forth in Appendix F.

STATEMENT OF THE CASE

The United States District Court, Connecticut District, had jurisdiction pursuant to Title 28, U.S.C. Sec. 1343.

In January 1986 petitioner filed a Complaint with the Federal District Court, Connecticut District, claiming violation of his Civil Rights, under Sections 1983, 1985 and 1986, Title 42 of U.S.C., First Amendment to the U.S. Constitution, and discrimination on account of race etc. under Title VII.

The trial court dismissed plaintiff's all legal claims in October 1986; on the remaining claims in equity held a bench trial in July 1987; and rendered a judgment in favor of defendants.

An appeal was then taken on the legal claims wrongly dismissed in October 1986 and the Court of Appeals, Second Circuit, reversed the dismissal of the First Amendment claims and remanded the legal claims to the trial court in September 1988.

An Order on Remand was issued by the District Court in June 1989 and further discovery took place accordingly. Also Petitioner issued a demand for jury trial in August 1989 and the District Court ruled in favor of petitioner in November 1989.

The District Court having fixed June 30, 1990 as the deadline for filing dispositive motions, the following motions were filed by both the parties with the resulting disposition by the court noted against each:

1) Defendants' Motion for Summary Judgment, which was based purely on findings of fact on issues in equity alone, by the same court in the same case, earlier in July 1987 -

granted on December 11, 1990;

2) Petitioner's Motion for Relief under Rule 60(b)(6) of F.R.C.P. from the Title VII Ruling and/or in the alternative Motion in Limine - denied as "moot" on December 26, 1990;

3) Petitioner's Motion for Leave to Amend the Complaint - denied on December 11, 1990; and

4) Petitioner's Motion for a Declaratory Judgment under Rule 57 of F.R.C.P. - also denied as "moot" on December 11, 1990.

A second appeal was then taken to the Court of Appeals for the Second Circuit on February 20, 1991, and Petitioner argued that the findings of fact on issues in equity through a bench trial, after wrongfully dismissing petitioner's all legal claims (which were later reversed and remanded to the trial court), were essentially "infected" since the issues went to a "wrong trier of facts" in the first place, and accordingly have to be vacated

and the whole case retried (giving preclusive effect to all earlier findings of fact) by the jury, especially since the defendants' motion for summary judgment and the granting of it by the court were both purely based on the findings of fact on issues in equity through the earlier bench trial, in violation of petitioner's Seventh Amendment rights for a jury trial at the very outset. Court of Appeals did not recognize the constitutional issue and the request for rehearing was equally futile.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons:

a) This Petition presents a Constitutional issue resolved by implication by this Court, but not specifically and unequivocally decided by this Court; and

b) The Opinion below conflicts, by implication, (i) with previous decisions of this Court, (ii) with the decision of other

Circuits, and (iii) with the decisions of other panels of the same Circuit.

Jury trial is guaranteed under the Seventh Amendment to the U.S. Constitution as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

This right to jury trial is reiterated in Rule 38(a) of the Federal Rules of Civil Procedure as under:

> "Rule 38. JURY TRIAL OF RIGHT
>
> (a) **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preseerved to the parties inviolate."

In Scott v. Neely, 140 U.S. 106, 109-110, this Court spoke long ago, in 1891, that:

> "In the Federal courts this (jury) right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency." (emphasis supplied)

The Scott Court, also speaking through Justice Field, held at p.109 that:

> "The general proposition, as to the enforcement in the Federal Courts of new equitable rights created by the States, is undoubtedly correct, subject, however, to this qualification, that such enforcement does not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States."

In Dimick v. Schiedt, 293 U.S. 474, 486, this court held:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

This principle has been reiterated by this Court, speaking through Justice Black, in Beacon Theatres v. Westover, 359 U.S. 500, 510-511 (1959), as under:

> "This longstanding principle of equity dictates that only under most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate /(19) can the right to a jury trial of legal issues be lost through prior determination of equitable claims. See Leimer v. Woods, 196 F.2d 828, 833-836.

> "/(19) For an example of the flexible procedures available under the Federal Rules, see Ring v. Spina, 166 F.2d 546, 660."

since "the right to a jury trial is a constitutional one, however, while no similar requirement protects trials by the court" and hence "that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." Id., 510. Under this dictum, the Court determined that "(I)t follows that if **Beacon** would have been entitled to a jury trial in a treble damage suit against Fox it cannot be deprived of that right merely because Fox took advantage of the availability of declaratory relief to sue Beacon first." Id., at 504. In that case, the district court, acting under the purported authority of Rules 42(b) and 57, directed that the issues of equity be tried to the court first before jury determination of the validity of the charges of antitrust violations made in the counterclaim and cross-claim, an action which was

characterized by the Court of Appeals to "operate either by way of res judicata or collateral estoppel" and "to limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit." Id., 504.

In fact, the issue was of so much concern to this Court in Dairy Queen, Inc. v. Wood, U.S. District Judge et al. 369 U.S. 469 (1962) that this Court, again speaking through Justice Black reiterated the dictum that a court of equity could not even take jurisdiction of a suit, "in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief"; expressed its apprehensions that:

> "Nonetheless, after the adoption of the Federal Rules, **attempts were made indirectly to undercut that right by having federal courts** in which cases involving both legal and equitable claims were filed **decide the equitable claims first."** Id., 472 (emphasis supplied);

unequivocally reiterated its earlier position

by stating:

> "At the outset, we may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury -that based upon the view that the right to trial by jury may be lost as to legal issues where those issues are characterized as "incidental" to equitable issues - for our previous decisions make it plain that no such rule may be applied in federal courts. In Scott v. Neely, decided in 1891, this Court held that a court of equity could not even take jurisdiction of a suit "in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief. "/(3)" Id., 470-471
>
> > /(3) 140 U.S. 106, 117. See also Cates v. Allen 149 U.S. 451, in which the principles expressed and applied in Scott v. Neely were explicitly affirmed.";

and reconfirmed the Seventh Amendment right for a jury trial as follows:

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to parties inviolate." Id., 472.

Referring to its earlier mandate in **Beacon Theatres**, the **Dairy Queen** court also reemphasized at 472 that:

> "Our decision reversing that case not only emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitu-tional right to trial by jury but also limits the issues open for determination here by defining the protection which that right is entitled in cases involving both legal and equitable claims. The holding in Beacon Theatres was that where both legal and equitable issues are presented in a single case, **"only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."**

By way of **obiter dicta**, in foot note # 8, **Dairy Queen** also noted with approval the Court of Appeal's dictum in **Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.**, 294 F.2d 486, 491, that "As long as any legal cause is involved the jury rights it creates control".

Then came before the Supreme Court the case of Meeker et Ux v. Ambassador Oil Corp. 308 F.2d 875 (1962), which, per curiam, reversed the judgment of the Court of Appeals for the Tenth Circuit, by simply quoting Beacon and Dairy Queen, ibid. Meeker et ux. v. Ambassador Oil Corp. 375 U.S. 160. In this case the trial court first determined the equitable issue under the first count against the plaintiff and then threw out the second count as well where Meekers would have been entitled to a jury trial, on the basis of dismissal of the first count.

In 1966, the Supreme Court, in Katchen v. Landy, Trustee in Bankruptcy, 382 U.S. 323 (1966) holding that:

> "In neither Beacon Theatres nor Dairy Queen was there involved a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury" (emphasis supplied)

has carved out an exception as under:

> "Both Beacon Theatres and **Dairy Queen** recognize that there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim."

especially since summary disposition, "without regard to usual modes of trial attended by some necessary delay," is one of the means chosen by Congress to effectuate that purpose, Ibid, 329 (quoting also Bailey v. Glover, 21 Wall. 342, 346, See generally Wiswall v. Campbell, 93 U.S. 347, 350-351; U.S. Fidelity Co. v. Bray, 225 U.S. 205, 218) i.e. **securing prompt settlement of bankrupt estates.** Accordingly, the **Katchen** court, speaking through Justice White, laid down the dictums that:

> "Thus, once a bankruptcy court has dealt with the preference issue nothing remains for adjudication in a plenary suit. The normal rules of res judicata and collateral estoppel apply to the decisions of bankruptcy courts." Id., 334.

> "The Bankruptcy Act, passed pursuant to the power given to Congress by Art. I, Sec. 8, of the Constitution to establish uniform laws on the subject of bankruptcy, **converts the creditor's legal claim into an equitable claim** to a pro rata share of

the res,.....", Id., 336. (emphasis supplied).

Once more, thirteen years later, in 1979, the Supreme Court has carved out a second exception to Beacon Theatres and Dairy Queen, in Parklane Hosiery Co. Inc., et al. v. Shore, 439 U.S. 322 (1979). However, Parklane involved **two separate actions**; and where "equitabloe claims" in the "second action" were decided early in a nonjury trial, it was held that the same could have a preclusive effect through collateral-estoppel application on the "legal claims" in the "first action."

As the Court spoke through Justice Stewart, Parklane presented the question "whether a party who has had issues of fact adjudicated adversely to it in an equitable action may be collaterally estopped from **relitigating the same issues before a jury in a subsequent legal action brought against it by a new party**". Id., 324.

The Parklane court also noted, as in the case of Katchen supra, "(T)he Securities Exchange Act of 1934 provides for prompt enforcement actions by the SEC unhindered by parallel private actions. 15 U.S.C. Sec. 78u (g)" Id., 338. **But note the spirited opposition to the conclusions of Parklane by the then Justice Rehnquist.**

The Opinions of the Courts below and Diversity of Opinions among Courts of Appeal

(a) Court of Appeals for the Second Circuit:

Prior to Parklane, the Court of Appeals for the Second Circuit had adopted the Ninth Circuit's opinion in Calnetics Corporation vs. Volkswagen of America, 532 F.2d 674 (1976) which essentially held that:

> "defendants right to a jury determination of plaintiff's claim for damages could not be infringed by prior judicial determination of equitable claim."

and reaffirmed the same in the post-Parklane case of Willie O. Wade v. Orange County

Sheriff's Office, 844 F.2d 951 (1988), presumably absent the two exceptions of Katchen and Parklane supra.

Furthermore, prior to Parklane, in Heyman v. Kline, 456 F.2d 123 (1972) the Second Circuit, speaking through Lumbard, Circuit Judge, also held that:

> "....this court, in furtherance of its responsibility to preserve the integrity of the judicial process, has a substantial concern in the consistent determination of any particular question. Were we to remand only the legal claims, we would create a situation ripe with the possibility of inconsistent determinations of the same question. Consequently, we conclude that all claims and counterclaims - both legal and equitable - must be remanded for retrial." Id. 131,

and affirmed same sixteen years later in the post-Parklane case of Willie O. Wade v. Orange County Sheriff's Office, 844 F.2d 951 (1988) (hereafter "Wade").

Furthermore, in the post-Parklane case of Sinicropi v. Nassau County, 634 F.2d 45 (1980), the Second Circuit held:

> "state court determination that public employer had not discriminated or retaliated against employee on basis of sex by forcing her to undergo psychiatric examination and treatment did not raise bar of res judicata to subsequent Title VII civil rights claim that she was terminated because of her earlier claims of sex discrimination as no state or federal court had passed on claim of retaliatory termination."

which is in strict conformance with Beacon Theatres, Dairy Queen, and Meeker, supra.

Also note that the Wade court has also adopted post-Parklane dictums in Bouchet noted hereinbelow. The Wade court speaking through Circuit Judge Kearse while noting that:

> "Thus, in Heyman v. Kline, 456 F.2d 123 (2d Cir.), cert. denied, 409 U.S. 847, 93 S.Ct. 53, 34 L.Ed.2d 88 (1972), a contract action encompassing both legal and equitable claims, in which we found that the defendant had been wrongly denied a jury trial on the legal claims, we set aside not only the district court's adjudication of the legal claims, but also its determination of the equitable claims." Id., 954

also held that:

> "The principle that the jury's verdict on the common factual issues precludes a contrary finding of fact by the court is applicable to an action that encompasses

> claims under Title VII and Sec. 1981. See e.g., Williamson v. Handy Button Machine Co., 817 F.2d 1290, 1293-94 (tth Cir. 1987) ("when the two are tried together, the jury's verdict governs factual issues common to them"); Lincoln v. Board of Regents, 697 F.2d 928, 934 (11th Cir.) (same), cert. denied, 464 U.S. 826, 104 S.Ct. 97, 78 L.Ed.2d 102 (1983). Similarly, in Bouchet v. National Urban League, Inc. 730 F.2d 799 (D.C.Cir. 1984), then-Circuit Judge Scalia observed that if the plaintiff, whose Title VII claim had been rejected by the district court after trial, were allowed to add common-law tort claims to her Title VII claims, then "(n)ot only would a jury trial on her tort claims be required, but the Title VII judgment - even if otherwise valid - would have to be vacated, and the whole case retried, giving preclusive effect to all findings of fact by the jury." Id. at 803-04." Id. 954-955.

However, the **dictum** in the post-Parklane case of Bouchet v. National Urban League, Inc. 730 F.2d 799 (D.C. Cir. 1984) (See reference to Bouchet hereinabove) is apt and applicable to the instant case.

Another case that is equally analogous and directly applicable to the situation of the petitioner is the post-Parklane case of Hussein v. Oshkosh Motor Truck Co. 816 F.2d 348 (7th

Cir. 1987). The Hussein court **adopted** the Bouchet court's post-Parklane dictums on wrongful dismissal of legal claims by the district court (and the trial to the bench of the remaining issues in equity), in any subsequent remanded actions in the same case.

It may be noted that the Second Circuit has also adopted Bouchet in the case of Wade supra, p. 954.

Notwithstanding all the precedents and case law within the Second Circuit, the panel (consisting of Circuit Judges Feinberg, Van Graafeiland, and McLaughlin) in Case No.90-9114 Narumanchi v. Board of Trustees et al. (unpublished) denied petitioner's request for similar relief and a request for rehearing yielded no better result.

(b) Court of Appeals for the District of Columbia Circuit

A post-Parklane case decided by this circuit, whose dictums are applicable to the

instant case, is known as Margo Bouchet v. The National Urban League Inc., et al., 730 F.2d 799 (1984) (hereafter "Bouchet"). Bouchet originally brought a Title VII discrimination (an issue of equity) case triable only to the bench and some claims triable to jury, but the trial court dismissed the claims triable to jury and on the remaining issues of equity tried them to the bench and found them against the plaintiff and in favor of the defendants. In this post-Parklane case, the Bouchet court, speaking through then-Judge Scalia, held the dictums that:

> "As a general rule, when a case contains claims triable to a jury and claims triable to the court that involve common issues of fact, the jury's resolution of those issues govern the entire case. See Dairy Queen v. Wood, 369 U.S. 469, 82 S.Ct.894, 8 L.Ed.2d 44 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 82 S.Ct.948, 3 L.Ed.2d 988 (1959). If, as appellant asserts, this rule is inapplicable with respect to Title VII (non-jury) claims, then the alleged erroneous disregard of her state-law claims and the consequent denial of her demand for jury trial would infect the disposition of her Title VII claim as

> well, since most if not all of its elements would have been presented to the wrong trier of fact. Not only would a jury trial on her tort claims be required, but the Title VII judgment - even if otherwise valid - would have to be vacated, and the whole case retried, giving preclusive effect to all findings of fact by the jury. See Calnetics Corp. v. Volkswagen of America, Inc. 532 F.2d 674, 690 (9th Cir.), cert. denied, 429 U.S. 940, 97 S.Ct. 355, 50 L.Ed.2d 309 (1976)." Id. 803-804.
>
> "Nor can we rely on Judge Penn's finding that the alleged defamatory statements were truthful, **since his authority to make such a finding, instead of leaving the issue to a jury, is the very point ultimately at issue.**" Id. 805. (emphasis supplied).

It may be noted here that the Bouchet dictums have been adopted by the Court of Appeals for the Second Circuit in the case of Wade supra and also adopted by the Court of Appeals for the Seventh Circuit in the case of Yassin Hussein v. Oshkosh Motor Truck Company, 816 F.2d 348 (7th Cir. 1987) - hereafter "Hussein" and discussed in detail herein below.

(c) Court of Appeals for the Seventh Circuit

A post-Parklane case that is analogous to the instant case of the Petitioner, resolved by the Court of Appeals for the Seventh Circuit, is the case of Yassin Hussein v. Oshkosh Motor Truck Company, 816 F.2d 348 (7th Cir. 1987) (hereinafter "Hussein").

In "Hussein" the plaintiff filed Title VII "equitable claims" and Section 1981 "legal claims" in the same complaint - as is the case in the instant case;

In "Hussein" the trial court earlier on dismissed all the Section 1981 "legal claims" of the plaintiff, thereby stripping him of his right for a jury trial - as is the case in the instant case;

Then in "Hussein" the trial court tried the Title VII "equitable claims" to the bench and found in favor of defendants - as is the case in the instant case;

Then the Plaintiff appealed the dismissal of the Section 1981 "legal claims", but did not appeal the judgment on Title VII "equitable claims" - as is the case in the instant case;

The Court of Appeals for the Seventh Circuit then held the district court's dismissal of the Section 1981 claim erroneous and remanded the case to the district court for proceedings consistent with their opinion. Id.350 - as the Court of Appeals for the Second Circuit in the instant case has remanded the first amendment claims of the petitioner to the district court, Narumanchi v. Board of Trustees, 850 F.2d 70 (2d Cir. 1988).

However, unlike in the present action, in "Hussein" defendant did in fact urge the Court of Appeals to apply the doctrines of res judicata and collateral estoppel to bar any further litigation of the Section 1981 claim.

The Hussein Court, speaking through Judge Ripple, held:

"Therefore, it is clear that, had the district court not erroneously dismissed the section 1981 claim, Mr. Hussein would have had a right to have a jury resolve those factual issues underlying the 1981 count. Furthermore, had the section 1981 claim not been dismissed, the district court could not have considered the equitable count first. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959)." Id. 354.

"Therefore, had it not committed legal error and dismissed the section 1981 claim, the district court would have been obliged to submit the legal claim under section 1981 to a jury. Moreover, in deciding whether to grant equitable relief under Title VII, the district court would have been prohibited from reconsidering any issues necessarily and actually decided by the jury. See Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1421 (7th Cir. 1986); Ohio-Sealy Mattreess Mfg. Co. v. Sealy, Inc. 585 F.2d 821, 844 (7th Cir. 1978), cert. denied, 440 U.S. 930, 99 S.Ct. 1267, 59 L.Ed.2d 486 (1979); see also Lincoln, 697 F.2d at 934; Heyman v. Kline, 456 F.2d 123, 131 (2d Cir), cert. denied, 409 U.S. 847, 93 S.Ct. 53, 34 L.Ed. 2d 88 (1972)." Id. at 355.

Dealing with the issues of collateral estoppel or res judicata the Hussein court also noted that:

"We believe that the present case presents a substantially different situation than that before the Supreme Court in Parklane. Here, there is no earlier valid judgment.

Mr. Hussein brought a single action in the district court. The facts underlying Mr. Hussein's section 1981 claim also form the basis of his cause of action under Title VII. Under the Federal Rules of Civil Procedure, the plaintiff is allowed to join his legal claims under section 1981 and his equitable claims /(7) under Title VII in a single lawsuit. See Fed.R.Civ. P. 18. Moreover, under the "same transaction" test employed in this circuit to define the scope of res judicata, if Mr. Hussein had not brought both claims in the same suit, a subsequent lawsuit would have been barred. **Car Carriers, Inc. v. Ford Motor Co.** 789 F.2d 589, 593 (7th Cir. 1986). Therefore, Mr. Hussein had no real choice but to bring both his section 1981 and his Title VII claims in one complaint. **Except for the error of the district court, he would have been able to obtain a jury determination of the facts underlying his discrimination complaint."** Id. 356 (emphasis supplied).

> "/(7) Mr. Hussein's cause of action under Title VII is considered equitable and, therefore, he is not entitled to a jury trial on that claim. See Grayson v. Wickes Corp., 607 F.2d 1194, 1196 (7th Cir. 1979)."

"It is hardly "needless litigation" to reverse a judgment on the ground that the plaintiff was denied his right to a jury trial through no fault of his own solely because of the error of the trial court." Id. 356.

After citing the Bouchet dictum that a judgment whose validity is "infected" because

it was "presented to the wrong trier of fact.", the Hussein court also held that:

> "We cannot sanction an application of collateral estoppel which would permit findings made by a court in an equitable proceeding to bar further litigation of a legal issue that had been properly joined with the equitable issue when those findings were made only because the district court erroneously dismissed the plaintiff's legal claim. To permit such an application would allow the district court to accomplish by error what Beacon Theatres otherwise prohibits it from doing." Id. 356-357.

However, the Hussein court was divided on the issue of vacating the Title VII judgment and did not do so.

(d) Court of Appeals for the Fourth Circuit

The Court of Appeals for the Fourth Circuit has had occasion to consider similar issues and in a post-Parklane and post-Bouchet case known as Madeline Ritter vs. Mount St. Mary's College, 814 F.2d 986 (4th Cir. 1987) (hereafter "Ritter"), dealt with problems similar to the instant action.

In Ritter the plaintiff brought a suit for equitable claims under Title VII and legal claims under EPA and ADEA. The district court dismissed the legal claims of the plaintiff under EPA and ADEA; conducted a bench trial on the remaining equitable claims under Title VII; and found the equitable claims in favor of defendants. The plaintiff appealed both the Title VII ruling and the earlier dismissal of the legal claims (N.B. that in the instant action the Petitioner did not appeal the Title VII ruling, but appealed only the dismissal of the legal claims). The Court of Appeals for the Fourth Circuit found the dismissal of the legal claims of Ritter in error and remanded the case for trial on the legal claims. However, the district court dismissed the legal claims as well holding that the Title VII findings collaterally estopped the relitigation of those facts before a jury on the remanded EPA and ADEA legal actions. On a second appeal

by Ritter, the Fourth Circuit affirmed the district court's action. Id. p.994. In so doing, the Fourth Circuit specifically rejected to adopt the precedents of other circuits in Bouchet (D.C. Circuit), Calnetics (Ninth Circuit), Heyman (Second Circuit), supra, and held a different reading of Parklane supra.

Thus there is a serious conflict in the interpretation and application of Katchen and Parklane by the various circuits below. While there are some minor and major differences between the factual situations of the cases cited as compared to the instant case, the one that is most analogous to the instant case is that of Hussein. However, within the same Second Circuit, the Narumanchi panel did not follow the earlier case of Wade which has specifically adopted the dictums laid down in Hussein (of the Seventh Circuit) and Bouchet (of the D.C. Circuit). Thus there is not only inter-circuit conflict, but there is intra-

circuit conflict as well in the interpretation and application of of Katchen and Parklane.

This Court should, therefore, grant certiorari here to review Katchen and Parklane as exceptions to the general rule of Beacon Theatres and Dairy Queen (to be applied only when Congress has chosen some means to secure a prompt and effectual administration and settlement of claims); and also review and affirm the the dictum laid down in Bouchet, spoken through then-Judge Scalia (following Beacon Theatres and Dairy Queen) - (and also see the spirited dissent by then-Justice Rehnquist in Parklane in defense of the right of parties for jury trial under the Seventh Amendment to the Constitution).

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

Respectfully submitted.

PETITIONER (PRO SE)

RADHA R.M. NARUMANCHI
657 Middletown Avenue
New Haven, Conn. 06513
Phone: (203) 562-6399
Dated: July 17, 1991
Redone: August 17, 1991

BEST AVAILABLE COPY

D.Conn.
H-86-51
Dorsey

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City and County of New York, on the 22nd day of April one thousand nine hundred and ninety-one.

Present: HONORABLE WILFRED FEINBERG,
HONORABLE ELLSWORTH VAN GRAAFIELAND,
HONORABLE JOSEPH M. McLAUGHLIN,

Circuit Judges,

RADHA R. NARUMANCHI,

Plaintiff-Appellant

- v. -

No. 90-9114

BOARD OF TRUSTEES FOR CONNECTICUT STATE UNIVERSITIES; MICHAEL ADANTI; ALAN LEADER,

Defendant-Appellees,

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said district be and hereby is affirmed.

Plaintiff-Appellant, Radha Narumanchi, appeals from a final judgment of the United States District Court for the District of Connecticut (Dorsey, Judge) granting summary judgment to defendants-appellees on plaintiff's action, brought pursuant to 42 U.S.C. Sec. 1983, for infringement of his First Amendment rights.

Narumanchi, a professor at the Southern Connecticut State University ("SCSU"), is a member of a certain committee in the School of Business Economics ("SBE") that evaluates the performance of other professors. He apparently gave an extremely negative evaluation of another professor. Soon thereafter, approximately eight students circulated a

petition to the SBE administration questioning Narumanchi's competence and his history of caustic evaluations of other professors. The administration then attempted to send an evaluation team to Narumanchi's class. He proceeded to lock this group out of his classroom. Narumanchi was then disciplined for his refusal to comply with school procedures.

On January 17, 1986, Narumanchi filed this suit, claiming violations of his First Amendment and due process rights as well as violations of Title VII. He claimed that defendants' disciplinary action was retaliatory in nature.

Judge Dorsey thereafter dismissed plaintiff's constitutional claims. The Title VII claims proceeded to a bench trial. At the close of trial, Judge Dorsey ruled in favor of defendants, holding that their actions were not improperly motivated. Plaintiff appealed the

dismissal of his constitutional claims, but, significantly, did not appeal the ruling on the Title VII claims._ On June 20, 1988, this Court reversed the dismissal of the First Amendment claims and remanded to the district court. Narumanchi v. Board of Trustees, 850 F.2d 70 (2d Cir. 1988).

On remand, defendants moved for summary judgment on the First Amendment claims. They submitted a statement of material issues as to which there is no genuine issue to be tried, as required by Local Rules of the District of Connecticut, Rule 9. Defendants' Rule 9 statement comprised mostly the facts determined in the earlier bench trial of plaintiff's Title VII claims. Plaintiff - who at this point was pro se -- submitted a memorandum of law in opposition, but no counter Rule 9 statement or any other documentary evidence.

Summary judgment is proper when there is

no genuine issue of material fact to be tried. F.R.Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Thus, where no reasonable trier of fact could reasonably find for the plaintiff summary judgment is proper. See id. at 252. A party opposing summary judgment cannot rest on the allegations contained in its pleadings to raise a genuine issue of fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 325-26 (1986). What facts are material for purposes of summary judgment is determined by substantive law. Anderson, 477 U.S. at 248.

To establish his First Amendment claims, Narumanchi must show, inter alia, that the allegedly retaliatory actions by defendants were motivated by his exercise of his First Amendment rights. Mt. Healthy City School District Board of Ed. v. Doyle, 429 U.S. 274, 283-86 (1977). Narumanchi has submitted no

evidence, in the form of affidavits or otherwise, sufficient to raise an issue of fact on this question. He is, therefore, unable to resist summary judgment. Because no reasonable trier of fact could have reasonably found for Narumanchi, summary judgment in favor of defendants was proper.

We have considered plaintiff's other arguments and find them to be without merit.

Accordingly, the judgment of the district court is affirmed.

WILFRED FEINBERG, U.S.C.J.
ELLSWORTH VAN GRAAFIELAND, U.S.C.J.
JOSEPH M. McLAUGHLIN, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RADHA R.M. NARUMANCHI

VS. Civil No. H-86-51(PCD)

BOARD OF TRUSTEES OF CONN.
STATE UNIVERSITY, et al.

RULING ON MOTION TO DISMISS OR ALTERNATIVELY FOR SUMMARY JUDGMENT

Defendants move alternatively for summary judgment or to dismiss plaintiff's claim that defendants' actions violated his first amendment rights on the grounds that (1) there is no genuine issue of material fact which would entitle plaintiff to relief; (2) based on this court's ruling after the trial on plaintiff's Title VII claims, plaintiff is collaterally estopped from reasserting his first amendment claim; and (3) the doctrine of qualified immunity requires dismissal.

Facts

The facts underlying this lawsuit are set forth in prior rulings, familiary with which is assumed. See e.g. Narumanchi v. Board of Trustees, 850 F.2d 70 (2d Cir. 1988); Ruling on Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, Civil No. H-86-51 (PCD) (October 2, 1986). Plaintiff's first amendment claim is before this court on remand from the Second Circuit, which held that plaintiff's first amendment are substantive and should not be analyzed in due process terms.

Subsequent to the October 2, 1986 ruling granting summary judgment on plaintiff's first amendment claim in defendants' favor, plaintiff's Title VII claims were tried and judgment entered for defendants. Plaintiff did not appeal that finding. Defendants argue that the issues involved in the first amendment claim are identical to those determined at the

trial of the Title VII claim, and that therefore, plaintiff's first amendment claim must be dismissed based on the facts then found.

Discussion

Summary judgment is appropriate only if the record "show(s) that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R.Civ. P. 56. "(I)n determining whether a genuine issue has been raised, a court must resolve all ambiguities and draw all reasonable inferences against the moving party." Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 57 (2d Cir. 1987). The moving party bears the initial burden of demonstrating that no factual issues exist. Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986). Once that burden is met, the opposing party must set forth specific facts

demonstrating that there is a genuine issue for trial. Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986). If the non-movant "generates uncertainty as to the true state of any material fact, the procedural weapon of summary judgment is inappropriate." American Int'l Group, Inc. v. London American Int'l Corp., 664 F.2d 348, 351 (2d Cir. 1982).

To establish a first amendment violation, plaintiff must show: (1) his conduct was constitutionally protected, i.e. the speech addressed matters of public concern; and (2) his conduct was a "substantial factor" or "motivating factor" for defendants' action taken against him. The court must then consider whether defendant can establish, by a preponderance of the evidence, that the same action would have been taken, even in the absence of the protected conduct. Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287

(1977). To establish his claim of retaliation under Title VII, plaintiff claims to have presented evidence of the following: (1) conduct protected under Title VII and known to defendants; (2) that defendants took employment action which disadvantaged plaintiff; and (3) that there was a casual connection between plaintiff's protected conduct and defendant's adverse employment action, i.e. that a retaliatory motive played a part in the adverse employment action. See Grant v. Bethlehem Steel Corp. 622 F.2d 43, 46 (2d Cir. 1980).

Plaintiff's first amendment claim asserts that the disciplinary action taken against him was motivated in part by his vocal opposition to the reorganization of the SCSU School of Business Economics and to the renewal of Martha F. O'Hara's employment at SCSU. Defendants' actions which allegedly violated his first amdnement rights were the same acts on which

plaintiff based his Title VII claims. Plaintiff claims defendants organized student complaints and used those complaints in retaliation for plaintiff's exercise of his first amendment rights. In connection with the Title VII claim, it was found:

> I find that the petition did not originate with any member of the faculty or administration. I find that the 13 Complaints that followed upon that evaluation, that petition, were not to be attributed to any of the defendants, that while the fact of the petition being followed upon by the written complaints was a procedural matter initiated by the defendants Adanti, I don't find that the determination to make the complaints, nor the subject matter of the complaints nor the substance of the complaints, is to be attributed to any other than the complainants themselves.
>
> I don't find that the course of action taken by Mr. Adanti in meeting with the students either was premised upon, or intended to, nor did it actually accomplish any preconceived negative implications or effect as far as the plaintiff is concerned.

Ruling, at 9-10. Plaintiff alleges that in retaliation for exercising his first amendment

rights, he was subjected to the elimination of courses which he has taught over the years. That claim was also addressed in the ruling on the Title VII claims:

> The plaintiff has made a further claim that in the handling of his course assignments he was eliminated from teaching courses. I do not find that that has been proved to be the case. If it were proven, however, I find that the decisions that were made, specifically by Mr. Leader was an intent to accommodate junior faculty for appropriate purposes of enhancing their qualifications and experience, and not for the purpose of producing a negative impact upon .. the plaintiff...

Ruling at 20. Plaintiff claims that in further retaliation he was suspended without pay and had detrimental information regarding his employment status and proposed disciplinary actions was leaded to the press. As to that claim, it was held:

> With respect to the suspension that Mr. Narumanchi complaints of, I find that the determination to discipline is reasonably within the prerogatives of an administration. No judgment is passed

> upon the propriety of the suspension as matter of contract interrelationship, nor as a matter of the appropriate conduct or behavior on the part of the professor.
>
> I think I have already found, but I will repeat if just to be sure, that the plaintiff has not proven that the students' complaints were organized against him by any of the defendants. I find that the defendants have not been shown to have leaked any information concerning disciplinary process to the press. I find that the absence of actions with respect to the plaintiff's grievances or other complaints short of the actual filing of grievances, has not been without some relationship to eother the factual situations that were engendered, or to appropriate discretionary determinations of an administrator.

Ruling at 21-22. Thus, plaintiff was found not to have established that a retaliatory motive played a part in the adverse employment actions. In view of these findings, plaintiff can not now prove that his vocal opposition to the university's policies was a "substantial" or "motivating" factor behind defendants' actions of which he complaints. The students' complaints regarding plaintiff's competence in

the classroom, which were not attributable to defendants, were reasonable grounds on which to initiate an evaluation of plaintiff. Ruling at 30. Plaintiff's refusal to cooperate with the evaluation led to defendants' decision to discipline him, which was reasonably within their prerogative. Ruling at 21. Thus, this court found that it was plaintiff's performance in his classroom, combined with his refusal to be estabiuated, not his vocal opposition to the reorganization of his department, which caused defendants to take the action complained of by plaintiff.

Similarly, it was found that plaintiff had not been eliminated from reaching courses, but that, even if he had, defendants' reason for doing so, i.e. to enable junior faculty to gain experience in the classroom was legitimate. In addition, it was found that defendants had not leaked any information to the press.

Thus, it cannot be said that plaintiff's protected conduct, his exercise of his first amendment rights, motivated defendants to take action against him. It has been found that defendants' conduct, of which plaintiff comlaints, was not motivated by any retaliatory intention on the part of defendants. There is no genuine issue of fact as to plaintiff's claim that defendants acted, in the several respects complained of, in retaliation for plaintiff's exercise of his first amdnement rights. Summary judgment in favor of the defendants must enter. 1/

Conclusion

Defendants' motion for summary judgment is granted.

SO ORDERED.

Dated at Hartford, Connecticut, this 11th day of December, 1990.

PETER C. DORSEY
United States District Judge

1/ Defendants' alternative bases for dismissal thus need not be addressed.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

RADHA R.M. NARUMANCHI
Plaintiff

Vs. Civil No.H-86-51 (PCD)

BOARD OF TRUSTEES OF THE
CONNECTICUT STATE UNIVERSITY,
ET AL.
Defendants

MOTION FOR RELIEF UNDER RULE 60(B)(6) OF FEDERAL RULES OF CIVIL PROCEDURE, FROM TITLE VII RULING 9JUDGMENT0 DATED 7-22-1987

AND/OR (IN THE ALTERNATIVE)

MOTION IN LIMINE TO PRECLUDE DEFENDANTS' PRESENTATION OF TITLE VII RULING (JUDGMENT) TO THE JURY IN THE IMPENDING JURY TRIAL

Pro Se Plaintiff hereby moves this honorable court to grant him Relief from Judgment or Order, under Rule 60(b)(6) of Federal Rules of Civil Procedure, from the Title VII Ruling dated 7-22-1987 of this honorable court.

Pro Se Plaintiff also moves this honorable court that in addition to the Relief from Judgment or Order, Plaintiff be also granted a Motion in Limine which would preclude the defendants, their lawyers, employees, agents, or witnesses from referring to or presenting, directly or indirectly, any of the Findings of Fact or Rulings of this honorable court in the said Title VII Ruling dated 7-22-1987, to the jury in the impending jury trial, and/or including, but not limited to, before any other court, agency, adjudicative body etc. in any

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12/11/90: Denied as moot.
SO ORDERED.

PETER C. DORSEY
USDJ

12-26-90: The order of 12-11-90 is vacated. The motion under Rule 60(b)(6) is denied as untimely. The motion in limine is denied as the evidence would be relevant but the issue is moot as there will be no trial. SO ORDERED.

PETER C. DORSEY
USDJ

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Tenth day of June, one thousand nine hundred and ninety-one.

RADHA R.M. NARUMANCHI
Plaintiff-Appellant
V. 90-9114

BOARD OF TRUSTEES FOR CONNECTICUT,
State Universities, MICHAEL ADANTI;
ALAN LEADER
Defendants-Appellees

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant-pro se, RADHA R.M. NARUMANCHI,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing

is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINED B. GOLDSMITH
Clerk

D.Conn.
H-86-51
Dorsey

MANDATA

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City and County of New York, on the 22nd day of April one thousand nine hundred and ninety-one.

Present: HONORABLE WILFRED FEINBERG,
HONORABLE ELLSWORTH VAN GRAAFIELAND,
HONORABLE JOSEPH M. McLAUGHLIN,

Circuit Judges,

RADHA R. NARUMANCHI,

Plaintiff-Appellant

- v. - No. 90-9114

BOARD OF TRUSTEES FOR CONNECTICUT STATE UNIVERSITIES; MICHAEL ADANTI; ALAN LEADER,

Defendant-Appellees,

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States

District Court for the District of Connecticut.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said district be and hereby is affirmed.

ISSUED AS MANDATE: 6-25-91

(1) AMENDMENT VII TO THE UNITED STATES CONSTITUTION

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

(1) RULE 38 (a) OF FEDERAL RULES OF CIVIL PROCEDURE

Rule 38. JURY TRIAL OF RIGHT.

(a) **Right Reserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.